

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte COREY HERMAN,
ZACHARY HERMAN and MARC HERMAN

Appeal No. 2001-2185
Application 09/205,079

ON BRIEF

Before FRANKFORT, MCQUADE, and BAHR, Administrative Patent Judges.

MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Corey Herman et al. appeal from the final rejection of claims 2 through 5, 7, 9 and 17 through 20. Claims 6, 8 and 10 through 12, the only other claims pending in the application, stand withdrawn from consideration pursuant to 37 CFR § 1.142(b).

THE INVENTION

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The subject matter on appeal relates to "a beverage holder used in passenger vehicles, particularly to a beverage holder

with anti-spill protection" (specification, page 1).

Representative claim 2 reads as follows:

2. A beverage holder comprising
a tray with top and bottom sides;
at least one drink well housed in said tray;
a beverage guard; and
a pivot member mounted on said top side of said tray
connecting said beverage guard to said tray, allowing said
beverage guard to move around said pivot member and positioned
to permit said beverage guard to move and completely cover
said drink well.

THE PRIOR ART

The references relied on by the examiner to support the final rejection are:

Pasmore	2,532,244	Nov. 28, 1950
Stern et al. (Stern)	4,795,211	Jan. 3, 1989
Young et al. (Young)	4,863,134	Sep. 5, 1989
Montgomery et al. (Montgomery)	4,972,781	Nov. 27, 1990
Lorence et al. (Lorence)	5,060,899	Oct. 29, 1991

THE REJECTIONS

Claims 2 through 4 and 7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Montgomery in view of Pasmore.

Claim 5 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Montgomery in view of Pasmore and Stern.

Claim 9 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Montgomery in view of Pasmore and Lorence.

Claims 17 through 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Montgomery in view of Pasmore and Young.

Attention is directed to the appellants' brief (Paper No. 10) and to the examiner's answer (Paper No. 13) for the respective positions of the appellants and the examiner with regard to the merits of these rejections.

DISCUSSION

Montgomery, the examiner's primary reference, discloses a foldable tray table designed to stably support articles such as beverage cans, tumblers and books in an outdoor (e.g., beach) setting. The table includes a top 10 having openings 16, 18 and 26 for receiving the articles, and leg assemblies

12 and 14 pivotally connected to the underside of the top. Each leg assembly consists of a pair of legs 40 and 42 and a cross bar 44. In the operative "unfolded" positions of the leg assemblies, the cross bars lie beneath the openings to provide bottom support for articles placed therein. Two of the openings 16 and 18 have circular configurations for accommodating beverage cans and tumblers.

As acknowledged by the examiner (see pages 4 and 7 in the answer), Montgomery does not respond to the limitations in independent claims 2 and 17 requiring the claimed beverage holder to include (1) a "beverage guard" and (2) a "pivot member" movably connecting the beverage guard to the tray so as to allow it to completely cover a drink well in the tray. The examiner's reliance on Pasmore to overcome these deficiencies is not well founded.

Pasmore discloses a holding and perforating device for evaporated milk cans or the like. The device comprises a base 1 for supporting the bottom of a can 2, a frame 4 upstanding from the base, a resilient clip 16 extending from the frame for gripping the can, a metal cover 12 pivotally mounted on

the frame by a pivot pin 10, and penetrating spurs 13 carried by the cover. In use,

when a can is engaged in the frame and rests on the base 1 it will be gripped by clip 16 and held firmly . . . , whereupon the cover can swing downwardly, until the spurs 13 rest on the can top. When it is desired to puncture the can top, pressure is exerted on the cover 12 in order to form the necessary openings therein. By puncturing two openings in the can top one may be used for pouring the contents and the other as a vent.

After each pouring operation the cover is left in its lowered position so that the spurs will close the openings to prevent deterioration of the can contents [page 1, column 1, line 57, through page 1, column 2, line 8].

In proposing to combine Montgomery and Pasmore to reject claims 2 and 17, the examiner concludes that it would have been obvious to a person of ordinary skill in the art "to implement a beverage guard (12) moveable with the assistance of a pivot pin (10) and mounted by a support frame (4) as taught by Pasmore onto the tray of Montgomery et al's invention to retain a beverage drink in position and prevent accidental spillage" (answer, pages 4 and 7).

The combined teachings of these references, however, do not indicate that the prevention of accidental spillage is of any real concern to Montgomery. Indeed, the Montgomery tray

table is specifically constructed to deal with accidental spillage in a manner befitting its intended use in an outdoor setting (see column 1, lines 16 through 19; and column 3, lines 33 through 36). The reality here is that Montgomery's tray table and Pasmore's can handling device have little in common in terms of either structure or function, and the rather specialized can puncturing and plugging characteristics of Pasmore's cover 12 have little, if any, relevance to the beverage cans and/or tumblers intended to be supported on Montgomery's tray table.

In this light, it is evident that the examiner has engaged in an impermissible hindsight reconstruction of the appellants' invention by using the appealed claims as a blueprint to selectively piece together isolated features in the prior art. Furthermore, this flaw in the basic Montgomery-Pasmore combination finds no cure in the examiner's additional application of Stern, Lorence or Young.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) rejections of independent claim 2 and dependent claims 3, 4 and 7 as being unpatentable over Montgomery in view of Pasmore, dependent claim 5 as being unpatentable over

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Montgomery in view of Pasmore and Stern, dependent claim 9 as being unpatentable over Montgomery in view of Pasmore and Lorence, and independent claim 17 and dependent claims 18 through 20 as being unpatentable over Montgomery in view of Pasmore and Young.

SUMMARY

The decision of the examiner to reject claims 2 through 5, 7, 9 and 17 through 20 is reversed.

REVERSED

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CHARLES E. FRANKFORT)	
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